IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No 245 of 2000

For Approval and Signature:

HON'BLE MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MESSRS. NIMIT STEEL P. LTD.

Versus

MESSRS. SQUARE DEAL ENG. P. LTD.

Appearance:

1. COMPANY PETITION No. 245 of 2000

MR SN SOPARKAR for Petitioner No. 1-2

DR MAHESH THAKAR for Respondent No. 1

MS MONA N TRIVEDI for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE K.A.PUJ

Date of decision: 24/08/2004

ORAL JUDGEMENT

The petitioner has filed this petition under Section 433 read with Section 434 of the Companies Act,

1956.

2. It is the case of the petitioner that pursuant to the order placed by the respondent Company, the petitioners supplied and delivered to the respondent Company various accounts of steel materials between the period commencing from 27.01.1997 to 19.01.1998 aggregating to a sum of Rs. 17,45,488/-. The said goods were duly received by the respondent Company without raising any dispute in respect of price, quality and quantity thereof. It is also the case of the petitioners that under the terms and conditions, as more particularly stated on the invoice payment in respect of each of the supplies would be made within 45 days failing which the petitioners were entitled to charge interest at the rate of 24% p.a. from due date. In respect of some of the supplies received by the Company, only after verification of quality of the material supplied, the respondent Company has accepted Hundis and promised to discharge their liabilities on due dates. However, all the Hundis executed by the Company were dishonoured when presented. The respondent Company, in part discharge of their liability has issued three cheques aggregating to a sum of Rs. 6,31,262.71 on 08.05.1998. However, all the cheques issued by the Company were dishonoured on presentation. After return of the said cheques, the petitioners called upon the respondent Company time and again to discharge its liability. However, the Company, in one reason or the other, failed and neglected to discharge its liability.

3. It is also the case of the petitioner that the respondent Company has confirmed on 01.01.2000 that a sum of Rs. 17,45,488/- was due and payable by the respondent Company to the petitioners and promised that the said amount would be paid within a period of six months. Despite this assurance and promise, the amount has not been paid by the respondent Company and hence, statutory notice dated 22.07.2000 was issued on the respondent Company calling upon it to discharge its liability failing which the petitioners would be constrained to file winding up petition before this Court. Despite the receipt of this notice, no payment has been made by the respondent Company. The petitioner has stated that a sum of Rs.27,40,820/- inclusive of interest of Rs.9,95,332/at the rate of 21% p.a. on the principal amount of Rs. 17,45,488/- was due and payable to the petitioner till 31.08.2000. The petitioner has also stated that the respondent Company has liability to the extent of Rs. 82,82,433/- and all the assets including plant and machineries of the Company were duly mortgaged to the

various financial institutions and also Bank of Baroda, Sayaji Road Branch, Baroda. Apart from this liability, large sums of monies were due and payable to the various Creditors and liabilities of the Company far exceed its assets and it is in the interest of the Creditors as well as in the petitioner's interest, the respondent Company is required to be wound up. It is further stated that the respondent Company is commercially insolvent and is unable to discharge its liabilities in normal course of business. It is, therefore, stated that it is just, equitable and necessary that the respondent Company is required to be wound up.

4. This Court has issued notice on 21.09.2000. The respondent Company has filed its appearance through its advocate and affidavit-in-reply was filed on 08.12.2000. The petitioner has also filed its affidavit-in-rejoinder. The petition was admitted on 25.04.2001 and the date of final hearing was fixed on 17.07.2001. The order regarding advertisement was also passed. However, the publication of the advertisement was deferred till 18.06.2001. It is at that stage, the parties have negotiated amongst themselves and settlement was arrived at between them. This Court has passed an order on 24.09.2001 recording the consent terms arrived at between the parties and disposed of the petition in terms of the said consent terms. As per the said consent terms, a sum of Rs. 22,50,000/- were agreed to be paid by the respondent Company to the petitioners in four quarterly installments commencing from February, 2003 to December, 2003. However, the respondent Company has not acted as per the said consent terms and not a single instalment has been paid. It was agreed by the parties in the consent terms that in case the respondent Company commits default in payment of instalment, the petitioner was entitled to approach this Court for revival of the petition and was further entitled to apply for necessary order for appointment of the Official Liquidator and other consequential reliefs.

5. Since the respondent Company has committed the breach of the consent terms, the petitioner has filed M.C.A. No. 27 of 2004 for revival of the Company Petition No. 245 of 2000. This Court has issued notice on 05.05.2004 in the said M.C.A. making it returnable on 18.06.2004. Since the said notice has not been received back, on 18.06.2004, Mrs. Swati Soparkar, learned advocate appearing for the applicant has requested for issuance of fresh notice and direct service was prayed for and it was made returnable to 06.07.2004. On 06.07.2004, since the affidavit for direct service was

not filed, the matter was adjourned to 15.07.2004. On 15.07.2004, the petitioner has placed on record the affidavit of service of one Mr. Parmesh Anandkumar Raval, employee of the petitioner Company narrating the detailed facts as to howmany efforts were made to serve the notice to the respondent Company and how it was not effected. An attempt was made by the petitioner to serve the respondent Company at its last known address. But due to one or other reason, the said notice was not accepted and it was refused. The Court has, therefore, passed an order on 15.07.2004 recalling the order dated 24.09.2001 and restoring Company Petition No. 245 of 2000 to the file and fixed the petition for final hearing. The Court has also directed the petitioner to issue public advertisement mentioning therein the fact regarding recalling of the order dated 24.09.2001 passed in this petition and restoration of the petition to file and fixing the date of final hearing on 12.08.2004. This advertisement was ordered to be published in "The Indian Express" and "Jansatta-Loksatta" - both Ahmedabad editions. The said advertisement was published in both the newspapers on 28.07.2004 and affidavit of publication was also filed before this Court on 12.08.2004. Despite the publication of the advertisement, nobody appears on behalf of the respondent Company. Even learned advocate Dr. Mahesh Thakkar who was appearing on behalf of the respondent Company on earlier occasions prior to the order having been passed on 24.09.2001 on the basis of the consent terms, did not appear thereafter. Mrs. Swati Soparkar, learned advocate appearing for the petitioner has, therefore, submitted that the Court should pass winding up order in the present petition as the respondent Company has admittedly failed to discharge its liabilities and even committed breach of the consent terms which are filed before this Court.

6. Having regard to the facts and circumstances of the case and after having heard Mrs. Swati Soparkar, learned advocate appearing for the petitioner and after having gone through the entire record of this petition and the order passed earlier on the basis of the consent terms, this Court is of the view that the respondent Company has not only failed to discharge its liabilities but has also committed breach of the consent terms which were filed before this Court. The Company has failed and neglected to pay its debt due and payable to the petitioner. The economical substratum of the Company has gone down and its liabilities far exceeded to its assets. It is, therefore, in the interest of the petitioners as well as the Creditors at large that the respondent Company is required to be wound up. The Company is,

therefore, ordered to be wound up and the Official Liquidator attached to this Court is hereby appointed as the Liquidator of the Company and he is directed to take charge of the assets of the Company and to exercise all the powers of the Liquidator which are conferred on him under the Provisions of the Companies Act, 1956.

7. It is, however, made clear that before taking charge of the assets of the Company, the Official Liquidator shall intimate any one or all Directors of the respondent Company as well as to the Secured Creditors and before taking out the inventory and/or appointing the security guards, he will take prior approval of this Court.

8. With the aforesaid direction, the present petition is accordingly allowed. There shall be no order as to costs.

Sd/-

[K.A. PUJ, J.]

#Savariya#

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